No. 16-1466

In The Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. AGENCY FEES ARE EXTRACTED FROM EMPLOYEE WAGES 2

A. The Conduit Hypothesis Fails 3

1. Contrary to precedent 4

2. Contrary to law 4

3. Contrary to common sense 6

4. Contrary to logic 7

5. Contrary to religious education cases .. 8

B. The Collectivist Wealth Hypothesis Fails . 9

II. THIS COURT SHOULD NOT, IN THE NAME OF *STARE DECISIS*, EXALT ERRONEOUS COURT PRECEDENT OVER THE CONSTITUTION ITSELF 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	2, 12, 16
Archer v. Economic Opportunity Comm'n, 30 F. Supp. 2d 600 (E.D.N.Y. 1998)	8
Arizona Christian School Tuition Org. v. Winn, 563 U.S. 125 (2011)	4, 5
Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003)	11
College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)	10
Furman v. Georgia, 408 U.S. 238 (1972)	10
Gonzales v. Raich, 545 U.S. 1 (2005)	10
Harris v. Quinn, 134 S. Ct. 2618 (2014)	4
Lochner v. New York, 198 U.S. 45 (1905)	10
Marbury v. Madison, 5 U.S. 137 (1803)	12-15
Matal v. Tam, 137 S. Ct. 1744 (2017)	1
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)	11

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) 1

Railway Employes Dep't v. Hansen,
351 U.S. 225 (1956) 4

Sniadach v. Family Fin. Corp.,
395 U.S. 337 (1969) 7

United States v. Biaggi, 705 F. Supp. 852
(S.D.N.Y. 1988) 8

Wooley v. Maynard, 430 U.S. 705 (1977) 6

Constitutions and Statutes

U.S. Const. art. III 5

U.S. Const. art. VI, cl. 2 ..... 2, 12

U.S. Const. amend. I ..... 2, *passim*

U.S. Const. amend. V 11

26 U.S.C. § 3402 7

29 U.S.C. § 158(a)(2) 4

29 U.S.C. § 186(a)(2) 4

Other Authorities

Samantha Bomkamp & Alejandra Cancina, "Hostess Twinkie plant in Schiller Park closes after 84 years," Chicago Tribune (Aug. 20, 2014) 10

Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1 (2007) 12

Michael S. Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706 (2003) ... 14

Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 Harv. L. Rev. 1 (2017) (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041341 ..... 1, *passim*

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to free speech and religious liberty. In this brief, the ACLJ responds preemptively to the highly counterintuitive argument that union fees are not extracted from employee wages and to the argument that *stare decisis* precludes the overruling of this Court's prior endorsement of compulsory union fees.

SUMMARY OF ARGUMENT

Agency fees are deducted from employee wages. The suggestion by Harvard Law professor Benjamin Sachs that these deductions are actually *not* taken from employee wages, Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 Harv. L. Rev. 1 (2017) (forthcoming), while creative, cannot withstand serious analysis.

Meanwhile, the contention that the doctrine of *stare decisis* means this Court should prefer a previous

---

[1] The parties in this case have consented to the filing of this brief. The blanket consent letters of the parties are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from amicus or counsel for amicus made a monetary contribution intended to fund the preparation or submission of this brief.

erroneous interpretation of the Constitution over the Constitution itself is contrary both to the Supremacy Clause and to the oath of office each Justice takes.

ARGUMENT

Government coercion of agency fees is unconstitutional because it forces an employee to support causes which that employee does not wish to support. Such coercion violates fundamental notions of liberty under the First Amendment. This amicus brief addresses two distinct efforts to sidestep that basic constitutional proposition.

First, an academic contends that, legally speaking, there is no coerced funding because the agency fee was never the property of the employee. Second, defenders of involuntary agency fees seek to shield that unconstitutional extraction behind the doctrine of *stare decisis*. Both arguments suffer from serious flaws, as explained below.

I. AGENCY FEES ARE EXTRACTED FROM EMPLOYEE WAGES.

Agency fees are a First Amendment problem because the government forces unwilling employees to fund a third party that they object to supporting: "every employee represented by a union – even though not a union member – must pay to the union, as a condition of employment, a service fee," *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977). Professor Benjamin Sachs of Harvard Law School, however, would "reject[] the . . . assumption that agency fees are payment made by employees," Benjamin I. Sachs, *Agency Fees and the First*

Amendment, 131 Harv. L. Rev. 1, 24 (2017) [hereafter "Sachs"] (forthcoming).[2] In other words, Prof. Sachs maintains that, although agency fees are deducted from employee wages, "it is a constitutional mistake to treat agency fees as payment that employees make to unions." Sachs at 31. This proposition, which Prof. Sachs formulates in two alternative ways, suffers from numerous fatal flaws.

A. The Conduit Hypothesis Fails.

Prof. Sachs offers two analytical hypotheses to support his argument. First is the notion that the agency fee payment "must be treated as one made by the *employer* to the union," *id.* at 4 (emphasis added) – i.e., the fee never became *employee* wages because its ultimate destination in union coffers was a foregone conclusion. That the payment commonly[3] appears as part of the workers' salary, Prof. Sachs maintains, is merely "an accounting formalism," *id.* at 3 – a constitutionally meaningless label for what is instead a conduit for a payment from the employer to the union. (The second hypothesis, that the agency fee belonged to the union all along, is discussed *infra* § I(B).)

---

[2]Prof. Sachs's draft is subject to revision. This brief cites to the version dated Sept. 22, 2017, posted Oct. 3, 2017, and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041341 as of Dec. 4, 2017.

[3]The agency fee is not always a deduction from the worker's paycheck. Sachs at 11 n.52 (sometimes the worker pays the fee *after* receiving a full paycheck).

1. Contrary to precedent

The conduit approach runs directly contrary to this Court's uniform line of precedents, as Prof. Sachs acknowledges. Sachs at 7-9. This Court has consistently recognized that a deduction from employee wages is, obviously, a deduction from employee wages. "From *[Railway Employes Dep't v.] Hansen*[, 351 U.S. 225 (1956)] to *Harris[v. Quinn*, 134 S. Ct. 2618 (2014)], each Supreme Court holding is predicated on the idea that *employees* are compelled to pay *their* money to the union." Sachs at 10 (emphasis in original). While this Court's precedents do not inevitably control, *infra* § II, Prof. Sachs, as explained below, offers no cogent reason to depart from this Court's plainly correct assessment of the situation.

2. Contrary to law

The proposition that the *employers themselves* are actually paying the union runs into an additional, very significant obstacle: such payments are *illegal* under federal (and state) law, as Prof. Sachs himself admits. Sachs at 11 (citing, *inter alia*, 29 U.S.C. §§ 158(a)(2), 186(a)(2)). The professor, however, dismisses that illegality as a mere "accounting regime," Sachs at 13, or "accounting formalism," *id.* at 3, claiming there is "not much substantive distinction" between direct employer payments to unions and employer-compelled payments by employees to unions, *id.* at 13. "In the end, the workers earn the same amount, the employer pays the same amount, and the union receives the same amount." *Id.* But this Court rejected a no-practical-difference argument of the same kind in *Arizona Christian School Tuition Organization v.*

Winn, 563 U.S. 125 (2011) (*ACSTO*). In *ACSTO*, the question was whether tax credits should be treated as government expenditures for constitutional purposes (specifically, Article III standing to bring an Establishment Clause claim). The challengers rightly noted that tax credits and government outlays "can have similar economic consequences," 563 U.S. at 141. Nevertheless, this Court held the difference to be both real and determinative. *Id.* at 141-44. Of particular relevance here, the *ACSTO* Court emphasized the fact that the credit and expenditure mechanisms differed in the extent to which each would "implicate individual" objectors, *id.* at 142. Here, where the agency fee is taken from the employee's personal wages, as opposed to an employer's (illegal) block payment to the union, the individual objector is implicated directly. For that individual, the payment arrangement is no mere "accounting formalism."[4]

Moreover, there are concrete reasons why it is illegal for employers to pay unions directly: to avoid the creation of "company unions" that are in the pocket of the employer. Sachs at 25-27 (citing authorities). Certainly one can argue – as Prof. Sachs notes – that this one degree of separation between unions and the company treasury is insufficient to prevent employer/union collusion or corruption. *Id.* at 27. But how much separation is enough is a policy judgment for lawmakers, and thus far lawmakers have rejected

---

[4]Prof. Sachs acknowledges as much: "It may be that, from the workers' perspective, seeing the [money] deducted from their paychecks . . . changes how they feel about the union: perhaps . . . they feel a closer and more ownership-like connection," Sachs at 13 n.60, which, to an objector, makes the arrangement all the more galling. *See also id.* at 29-30.

the view that direct payments from employers to unions are acceptable.

It is thus illegal for an employer to pay a union the agency fee. This Court ought not to overrule that legislative judgment by "deeming" precisely such a payment to be taking place, all in the service of defeating employees' First Amendment rights to dissent.

3. Contrary to common sense

A deduction from one's salary takes the amount in question away from the employee; absent the deduction, that money would go into the pocket or bank account of the worker. And in some cases, as Prof. Sachs notes, the money *does* go first to the employee, subsequently to be forked over to the union. Sachs at 11 n.52. That the ultimate payment to the union is compelled does not change who is paying whom. People face compulsory fees all the time – airline baggage fees, environmental disposal fees for car maintenance, cancellation fees for hotel reservations, etc. That the fees are mandatory makes no difference to the identity of the payor or size of the dent in the wallet (or, in this case, the dent in the First Amendment). In *Wooley v. Maynard*, 430 U.S. 705 (1977), for example, car owners objected to being forced to display the state motto, "Live Free or Die," on their auto license plates, *id.* at 706-07. This Court held that by requiring the car owners to "use their private property as a 'mobile billboard' for the State's ideological message – or suffer a penalty," the government had unconstitutionally compelled speech. *Id.* at 715. That the car owners had no "genuine

choice" in the matter, *cf.* Sachs at 14, was precisely the problem, not the solution.

Moreover, agency fees are not the only payroll deduction an employee can face. Most obviously, there are regular extractions for income tax withholding. 26 U.S.C. § 3402. That such extractions take a short trip from the employer's bank account to the IRS does not mean they are not wages attributable to the employee (and taxed as such!).[5] Likewise, portions of a paycheck can be garnished for payment of debts, but the garnished amount was still the employee's money. Indeed, the premise of this Court's ruling that due process requires notice and a hearing before wages may be garnished, *S. Sadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), is that garnished wages are the property of the employee. The involuntary nature of the payment does not negate the reality that, as with agency fee deductions, the employee is being forced to pay money to a third party.

4. Contrary to logic

The conduit theory also suffers from circularity. According to that theory, if the agency fee payment is voluntary, then that payment represents the employee's own money. But if that payment is *coerced*, then it morphs into a payment by the employer. Hence,

---

[5]To be sure, some other deductions can be "above the line" for tax purposes, i.e., the IRS will treat them as reducing the employee's taxable income. But the amount deducted for tax withholding remains taxable employee income. Similarly, wages that go to pay union agency fees remain employee income, even if a portion of those agency fees can be deducted on Schedule A of Form 1040.

the coercion itself becomes the justification for upholding the coercion against a First Amendment challenge. That is like saying an extortion victim forced to yield a portion of his salary did not lose property because the extraction was involuntary; the extorter was simply redirecting the payment to himself or his bag man. *Cf. Archer v. Economic Opportunity Comm'n*, 30 F. Supp. 2d 600, 607 (E.D.N.Y. 1998) ("Plaintiffs allege that the EOC, the local CAPs and the individual defendants conspired to . . . extort a portion of plaintiffs' salary every work period for the CAP fund"); *United States v. Biaggi*, 705 F. Supp. 852, 863 (S.D.N.Y. 1988) ("Count Twenty-One charges Simon with demanding and obtaining a portion of Lawrence's salary in extortionate fashion").

5. Contrary to religious education cases

More intriguingly, Prof. Sachs seeks support by analogizing agency fees to tuition payments to private schools. He notes that under this Court's Establishment Clause cases, private choice – as with parents using a voucher or tax credit to defray costs of the private school of their choice – can "break the circuit" connecting the money to the government, thereby alleviating any Establishment Clause concern about government funding of religion. By contrast, where the government hypothetically dictates to parents where they must spend the voucher or money earning the tax credit, the government might be deemed the body choosing to devote funds to religious education, raising the spectre of an unconstitutional establishment of religion. Sachs at 14-16. But this analogy breaks down under examination.

The point of the "circuit breaking" concept is not to relabel the money, but to identify *the actor who chooses* where the money goes. Is the government picking the funding recipient, or is a private party (typically a parent)? If the latter, the destination of the funding stream cannot fairly be attributed to the government; the government is funding education *simpliciter*, not religious education in particular; what form that education takes depends upon the decisions of independent private parties. As Prof. Sachs acknowledges, this "circuit breaking" concept addresses the Establishment Clause concern about coercing a taxpayer to violate his or her conscience. Sachs at 14-15. It is therefore most ironic that Prof. Sachs would use the analogy to try to justify a violation of conscience, viz., coercing an employee to support an entity propagating ideas to which the employee objects. If anything, this Court's Establishment Clause jurisprudence weighs *against* such coercion.

Prof. Sachs thus has the religious school funding cases exactly backwards. Those cases focus on avoiding the coerced funding of ideas or entities, contrary to the conscience of those from whom the funds are derived – precisely the goal of the First Amendment challenge here.

B. The Collectivist Wealth Hypothesis Fails.

Second, and in the alternative, Prof. Sachs posits that the amount of the agency fee actually belonged to the union all along. Invoking "a strand of economic theory going back at least to John Stuart Mill," Sachs at 22, Prof. Sachs proposes that (1) the efforts of the

union boost worker wages,[6] (2) that boost therefore is justly regarded as the collective property of the union, not that of the individual worker, and hence (3) the union is simply recapturing a portion of what it already owns. *Id.* at 22-24. That is, per Prof. Sachs, "the product of collectivization . . . belongs to the collective which produced it." *Id.* at 5. This Court has repudiated, however, the notion that the judiciary should "impose a particular economic philosophy upon the Constitution." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (citing Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905)). There is no privileged exception even for one described by some Justices as "the great English political philosopher John Stuart Mill," *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting).

The collectivist recharacterization of the ownership of property, moreover, is a theory that would be difficult to cabin. A given salary will be the product of an endless set of factors and agents: local infrastructure, consumer appetites, advertising budgets, the size and skill level of the local population, the cost of outsourcing, etc. *ad infinitum*. Given "the interconnectedness of economic activity," *Gonzales v. Raich*, 545 U.S. 1, 70 (2005) (Thomas, J., dissenting),

---

[6]This, of course, is not always true for any individual worker. The higher cost of unionized staff may induce the employer to lay off employees; for those workers, the union will have reduced their salary to zero. Ditto for all of the employees of a business that closes or relocates in response to the higher cost of union employees. *Cf.* Samantha Bomkamp & Alejandra Cancina, "Hostess Twinkie plant in Schiller Park closes after 84 years," Chicago Tribune (Aug. 20, 2014) (struggling plant shutting down within months of vote to unionize).

there is no way to separate out the "collective's" percentage of anyone's wages – or, for that matter, the "collective's" share in anyone's property value. *Cf.* Sachs at 23 (noting theory's applicability to land values). To embrace that theory would unsettle the notion of asset ownership across the board.

Prof. Sachs asserts that litigation over the constitutionality of IOLTA fees supports the collectivist view, *id.* at 18-22, citing the rulings of *lower* courts that the interest which the pooled IOLTA funds generated "was not property of the individual clients but rather belonged to the IOLTA program," *id.* at 19. How this helps Prof. Sachs is hard to see; when this Court addressed the issue, it reached the *opposite* result. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court squarely held that the interest income generated by client accounts commandeered under a state IOLTA program *was* the private property of the account owner for purposes of the Takings Clause of the Fifth Amendment. While this Court subsequently held that the "just compensation" due for any such taking was zero, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), that holding only addressed the remedy, not the nature of the property at issue.[7]

* * *

In sum, Prof. Sachs has offered no persuasive reasoning for departing from the obvious – that money

---

[7]Nor did this Court address a First Amendment claim in either *Phillips* or *Brown*.

taken from an employee's wages is money taken from that employee.

II. THIS COURT SHOULD NOT, IN THE NAME OF *STARE DECISIS*, EXALT ERRONEOUS COURT PRECEDENT OVER THE CONSTITUTION ITSELF.

This Court upheld the coerced extraction of union agency fees in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Defenders of that holding invoke the doctrine of *stare decisis* as counseling adherence to *Abood* on this point even if it was wrongly decided. This Court should decline that invitation. To embrace an incorrect judicial interpretation of the Constitution (*stare decisis* is not needed to defend *correct* decisions), rather than ruling as required by the Constitution itself, is to exalt court rulings above the Constitution, in violation of the Supremacy Clause, U.S. Const. Art. VI, cl. 2 (the Constitution is the "supreme Law of the Land"),[8] and the judicial oath of office (in which the judge or Justice pledges fidelity to the Constitution).

To reach this conclusion one need only look to the logic of *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, this Court addressed the question whether the judiciary could rule that a legislative act was "repugnant to the constitution" and thus "void" – i.e., unconstitutional. *Id.* at 180. The answer was "yes" –

---

[8] "The Supremacy Clause conspicuously does not include 'decisions by the United States Supreme Court' when naming the sources of law at the top of the legal food chain." Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 6 (2007).

precisely because the Constitution bound both the legislature and the judiciary.

The notion of a written constitution, Chief Justice Marshall explained for the Court, was that such document "form[s] the fundamental and paramount law of the nation," *id.* at 177, which "establish[es] certain limits not to be transcended" by the various branches (Marshall calls them "departments") of the federal government, *id.* at 176. These branches, of course, include the judiciary: "courts, as well as other departments, are bound by that instrument." *Id.* at 180. Thus, while "[i]t is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, the courts must "decide the case . . . conformably to the constitution," *id.* at 178. In case of a conflict between the Constitution and some other source of law, the Constitution, as "a paramount law," *id.*, must prevail. Applying this logic to the particular case of unconstitutional legislation, the *Marbury* Court explained:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the

> constitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 178. But since the Constitution also is "a rule for the government of courts," *id.* at 180, it follows that judicial acts – court rulings – must likewise be subordinate to the Constitution.[9] Consider the same passage from *Marbury* quoted above, altered to insert "precedent" in place of the references to legislation:

> So if a precedent be in opposition to the constitution; if both the precedent and the constitution apply to a particular case, so that the court must either decide that case conformably to the precedent, disregarding the constitution; or conformably to the constitution, disregarding the precedent; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any precedent of the courts; the

---

[9]As Prof. Michael Paulsen has written:

> Under Chief Justice John Marshall's reasoning (and Alexander Hamilton's before him in *Federalist* No. 78), the duty and power of judicial review do not mean the judiciary is supreme over the Constitution. Rather, the duty and power of judicial review exist in the first place because the Constitution is supreme *over the judiciary* and governs its conduct. As Marshall wrote in *Marbury*, "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."

Michael S. Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706, 2709 (2003) (footnote omitted; emphasis in original).

> constitution, and not such precedent, must govern the case to which they both apply.

This is only common sense. Moreover, as Chief Justice Marshall continued, the judicial oath of office reinforces the same obligation of fidelity to the Constitution:

> . . . it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.
>
> Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!
>
> . . .
>
> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Id. at 179-80.

In short, if this Court concludes that *Abood*'s approval of coerced agency fees is inconsistent with the First Amendment to the Constitution, this Court is duty-bound to prefer fidelity to the Constitution over fidelity to its own contrary precedent.[10]

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Dec. 6, 2017

---

[10]Of course, judicial precedent can be consulted for its information function and persuasive weight: there is value in reading and considering what a prior court thought about a question. But that is quite different from treating such a prior opinion as equivalent to constitutional text.